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No. 82 5877

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHNNIE L. JOHNSON,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

On Writ of Certiorari
To the Supreme Court of Georgia

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED.

1. Whether death is an unconstitutionally excessive and disproportionate penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life?

2. Whether petitioner's degree of participation in the murder was given inadequate consideration and inadequate weight by the Georgia courts, thereby violating his rights under the Eighth and Fourteenth Amendments?

3. Whether the sentencer was precluded from properly focusing on and considering petitioner's own conduct in violation of the Eighth and Fourteenth Amendments?

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Note: Citations in the text of this petition are to Ga. Code Ann., which was the official code of Georgia at the time of Johnson's trial and at the time the Supreme Court's recent opinion in his case.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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Petitioner, Johnnie L. Johnson, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia.

OPINIONS BELOW.

The opinion of the Supreme Court of Georgia, affirming the trial court's denial of Johnson's petition for a writ of habeas corpus, is reported at Johnson v. Zant, 249 Ga. 812 (1982). The trial court's order denying habeas corpus relief is not reported.

The opinion of the Supreme Court of Georgia on direct appeal affirming petitioner's convictions and death sentence is reported at Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978). Petitioner also filed an extraordinary motion for "extraordinary relief", the denial of which was affirmed by the Supreme Court of Georgia at Johnson v. State, 246 Ga. 474 (1980). These opinions are reproduced in the Appendix A to this petition.

JURISDICTION.

The judgment of the Supreme Court of Georgia was entered on September 10, 1982. This petition was filed within 90 days of that date.

Petitioner asserted below and asserts here a deprivation of rights secured by the Constitution of the United States. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

## CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED.

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excesive fines imposed, nor cruel and unusual punishments inflicted ....

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> Nor shall any State deprive any person of life, liberty, or property without due process of law.

This case also involves the following provisions of the statutes of the State of Georgia, which are set forth in Appendix C to this brief: Ga. Code Ann. §§ 26-201,26-801,26-1101, and 27-2534.1(b)(7).

## STATEMENT OF THE CASE.

This is a death penalty case. In the judgment appealed from, the Supreme Court of Georgia granted petitioner's application for certificate of probable cause to review the trial court's decision, but affirmed the trial court's order denying habeas corpus relief.

In 1974, Johnson was convicted by a jury of the offenses of murder, rape, simple kidnapping, and aggravated assault. He received a sentence of death for the murder. The only statutory aggravating circumstance to support the sentence is Ga. Code Ann. §27-2534(b)(7), that the murder was "wantonly vile, outrageous, horrible or inhuman."

During the guilt phase of the trial, the surviving victim unequivocally stated that she never saw the murder weapon in Johnson's hand; in fact, she placed it in the hands of Johnson's co-defendant Sprouse. She also testified that there was no exchange of words or encouragement by Johnson regarding use of the gun. The evidence shows that there was no plan to murder and no way that Johnson could have anticipated that death would result from the kidnapping and rape scheme; the shooting which actually took place was sudden and spontaneous.

Johnson's jury was charged on standard "aider and abettor" language from Ga. Code Ann. §26-801, including instructions that if Johnson was to be found responsible for the murder, he must have participated through "felonious design"; the jury was also charged on intentional homicide and felony murder. During deliberations, the jury repeatedly (three times) requested to hear the testimony and charges as to responsibility of parties to a crime. However, the jury made no specific findings as to whether petitioner killed, attempted to kill, or intended to kill.

During the sentencing phase, Johnson's trial counsel did not present any evidence in mitigation of punishment, although relevant mitigating circumstances would include the relative culpability for the murder, lack of any prior record, no history of violent crimes or behavior, his age(20), and character. The jury was not specifically instructed on what to consider as mitigating evidence or the option to recommend mercy if they should find aggravating circumstances. The issue of the jury's unguided discretion was first raised in the state habeas petition. The habeas court found that these instructions, read in their entirety, could have been more "illuminating." (Order of Habeas Court §E), although the Georgia Supreme Court found adversely to petitioner on this issue, Johnson v. Zant, 249 Ga. 812(2) (1982).

Co-indictee Sprouse (the triggerman, who was tried separately) was convicted of murder, kidnapping with bodily injury, and two counts of aggravated assault; the aggravating circumstances found by the jury included both Ga. Code Ann. §25-2534(b)(2) (committed in the course of another felony) and (b)(7). His sentences were reversed in 1979 by the Georgia Supreme Court because of improper instructions on the aggravating circumstances, and again because of the trial court's exclusion certain testimony during re-sentencing in 1982.

This disproportionality issue was first raised on motion

for new trial and in the enumeration of errors to the Georgia Supreme Court on direct appeal. Again, it was raised on motion for rehearing following affirmance of the death sentence. The issue of relative culpability of a nontriggerman was not expressly ruled on by the Georgia Supreme Court until Johnson v. Zant, 249 Ga. 812(5).

REASONS FOR GRANTING THE WRIT

In this death case, the Supreme Court of Georgia granted petitioner's certificate of probable cause to appeal from the trial court's order denying him habeas corpus relief. In affirming denial of the petition for habeas corpus, the Supreme Court of Georgia decided a federal question in conflict with applicable decisions of this Court. Specifically, the Supreme Court of Georgia concluded that it is neither arbitrary, excessive nor disproportionate to impose a death sentence on one who does not fatally wield the murder weapon if the non-triggerman is present active and participating in the commission of crimes, and aiding in leaving the scene.

Petitioner urges that the holding of Enmund v. Florida, 102 S.Ct. 3368 (July 2, 1982), is applicable to the facts of this case; that the Supreme Court of Georgia relied upon petitioner's "presence" and "active participation" to reject Enmund's holding and therefore applied an incorrect standard. There was no clear finding by the trier of fact as to whether petitioner killed, intended, or attempted to kill. The factfinder was precluded from making and did not make individual considerations in mitigation, such as relative culpability, in determining sentence. The Supreme Court of Georgia, in its review, did not consider the sentence disproportionate to "similar" cases even though the triggerman, codefendant Sprouse, has no valid sentence of death.

ARGUMENT

THE GEORGIA COURTS FAILED TO GIVE ADEQUATE CONSIDERATION AND WEIGHT TO PETITIONER'S CULPABILITY AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS

## I. INTRODUCTORY STATEMENT.

The Georgia Supreme Court rejected petitioner's argument that his death sentence was excessive and disproportionate as well as arbitrary in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution in Johnson v. Zant, 249 Ga. 812, 816(5) (1982). In deciding that Enmund v. Florida, 102 S.Ct. 3368 (July 2, 1982), was not applicable to Johnson's case, the Georgia Supreme Court found that "Johnson was not only present but active and participating throughout commission of the crimes of which he is convicted," and that the facts in Johnsons's case are "substantially dissimilar." 249 Ga. 812, at 816-7. Nowhere in the record, however, is there any finding made by the trier of fact as to whether Johnson killed, attempted to kill, or intended to kill.

The basic premise in Enmund in that the death sentence is unconstitutionally disproportionate under the 8th and 14th Amendments for a nontriggerman who "neither took life, attempted to take life, nor intended to take life." Enmund v. Florida, 102 S. Ct. at 3371-2, 3374, f. 15, 3376, 3379). The second part of the Court's holding is that the focus must be on the individual's culpability, because his culpability is different from that of a codefendant triggerman where he did not "kill or intend to kill." Id., 3372, 3377; O'Connors, J., dissenting, 3383-91.

The Florida trial court found evidence in the record to support a conclusion that Earl Enmund was an active participant in the general transaction from which death resulted. Id. 3371, f. 2; dissent, 3391, f.40. The Florida Supreme Court, however, found a supportable inference of Enmund's participation only in his staying in the getaway car to help the robbers escape during the commission of the armed robbery. Id. 3371, f. 2. The dissent also notes that Enmund located the appropriate victims three weeks before the crime, Id. 3379-80, f. 5, 3391, f. 40, Enmund v. State, 399 So. 2d at 1365; and that he actively participated in concealing the murder weapon, Id. 3380, f. 6. As to the planning

of the armed robbery, it was the prosecution's theory that Enmund in fact "had set it all up," Id. 3380, f. 7.

The Enmund decision, in presenting an analysis of the facts, repeatedly emphasizes the "kill or intend to kill" formulation, and it is this factor, rather than presence at the scene of the crime or assisting in the escape, which is relevant to the constitutional formulation, Id. 3371, f. 2. Although Enmund knew a gun would be used in the perpetration of other crimes, he did not anticipate lethal force being used in armed robberies. There was no plan to murder. Enmund did not participate in any decision to shoot the victims, and there is no way Enmund could have prevented the shooting from taking place when his codefendants decided to use the guns. Enmund v. Florida, 399 So.2d at 1369.

The critical elements of the analysis are applicable to Johnson's situation. Johnnie Johnson was a party in the general transaction from which homicide resulted but for which there was no calculation or design to take life. Johnson also knew that a gun was being used in furtherance of the kidnapping and rape. Like Enmund, there was no plan to murder, and no more foreseeability of death from the kidnapping and rape scheme than in Enmund's plot for robbing his victims by gunpoint. Johnson did not participate in any decision to shoot the victims, and the final, ultimate decision to murder the victims was made solely by Johnson's codefendant Jerry Sprouse. The shooting violence which actually occurred was sudden and unexpected.

## II. THE GEORGIA COURTS APPLY AN INCORRECT STANDARD IN DETERMINING THAT PETITIONER'S PRESENCE AND AFTER THE FACT AIDING AND ABETTING ARE THE PROPER FOCUS FOR IMPOSING THE DEATH SENTENCE.

### A. The Georgia Court has not made precise, consistent factfindings, supported by the record.

The Supreme Court concluded in the judgment below that it is neither arbitrary, excessive, nor disproportionate to impose a death sentence on one who does not fatally wield the murder weapon under circumstances where the nontriggerman is "present, active

and participating in the commission of crimes" and aiding in leaving the scene. Johnson v. Zant, 249 Ga. 812, 817 (1982).

Scrupulous reliability in factfinding should be found in a state factual determination, yet there are a number of crucial inconsistencies in the factfinding based on Johnson's record. Lockett v. Ohio, 438 U.S. 586 (1978), requires that the degree of participation in a homicide be considered in determining the proper punishment; there must be "some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life." Id. 438 U.S. at 616.

Johnson was involved in the general transaction from which homicide resulted. But the record makes very clear that there was no calculation or design by Johnson to take life, nor was there any way he could have anticipated death would result from the kidnapping and rape scheme.

The requirement that there be "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination" of punishment, Gregg v. Georgia, 428 U.S. 153, at 190 (1976), cannot be ignored here. The sentencer and, more than ostensibly, the Georgia appellate courts (to avoid arbitrary and capricious results) are required to make a reliable inquiry and considered finding as to the extent of culpability and why, even if the record does not reflect the petitioner had a conscious purpose to bring about death of the victim, he is nonetheless being executed for his role in the crime. Yet this has not been done in petitioner's case.

It is perhaps most helpful to look at the testimony presented by and most helpful to the state -- the account of events given by the surviving victim, Mary Lynn Harrod. For example, while the Georgia Supreme Court finds that Johnson "intended to employ lethal force to effectuate the kidnap in rape," Id. at 817, Harrod's testimony does not support such a conclusion.

First, the unequivocal testimony of Harrod is that she never saw the murder weapon in Johnson's hand. She did not see the gun when she and her friend were smoking grass at the high school: the first time she saw it was in Sprouse's hand as he approached the women's car and told the women to accompany him (R. p.51)[1]

She placed it in Sprouse's hand from that time on: when Sprouse got in the back seat of Johnson's car with her; throughout the ride to the woods (R., p. 57); when Sprouse told the women to put their heads down (R., pp. 74, 78); as the women's hands were tied (R., p. 57); when Sprouse told Suzanne Edenfield to gag Harrod and she tried unsuccessfully to gag Suzanne (R. p.75).[2] It was still in Sprouse's hand when the car stopped in the woods and during Sprouse's attempted rape of her in the car (R. p.78).

Nor did Harrod see Johnson with the gun when he and Suzanne left and returned from the woods, when Suzanne got back in the car, when Sprouse told both women to get out of the car, or when Sprouse told them to stand on the side of the road (R. pp. 78-9). Johnson did not have the gun while Sprouse was directing Johnson to turn the car around (R. p. 79). The evidence amply authorizes a finding that Johnson never had the gun in his hand (R. pp. 74-5; 77-9; 103).

At the point precisely before the shooting, Harrod has never been able to remember who had the gun. But, she has never stated that she saw it in Johnson's hand. Her testimony has not deviated from the time of Johnson's trial in 1975 until Sprouse's resentencing in March 1982.[3] The evidence amply authorizes a finding that Johnson never had the gun in his hand (R. pp.74-5; 77-9; 103).

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[1] On direct appeal, the Georgia Supreme Court finds that "Sprouse appeared with the gun and forced the girls into the car at gunpoint," 242 Ga. at 650, while on review of the habeas proceeding, 249 Ga. at 817, the court finds: "Johnson and Sprouse forced them into Johnson's car at gunpoint" [emphasis added].

[2] On direct appeal, 242 Ga. at 650, the opinion states that both "Johnson and Sprouse bound and gagged the girls"; but it was only "Johnson who unsuccessfully tried to gag the girls" according to the review of the habeas denial, 249 Ga. at 817.

[3] In the recent decision of Sprouse v. State, Georgia Supreme Court Case No. 38822, (decided October 27, 1982), Harrod's testimony again is that Sprouse pulled the gun initially.

Second, there was no exchange of words or conversation between Johnson and Sprouse regarding use of the gun. There was, in fact, very little conversation at all: Harrod said there was no conversation during the ride, except "they asked where was Highway 80" (R., p. 54). The women asked where they were going; Sprouse replied that the "big man" wanted to talk to them (R. p. 102.)There was no conversation between anyone when the car stopped in the woods (R. p.58). Sprouse was still in the back seat and still had the gun when Johnson and Suzanne returned to the car. Sprouse then came to the back seat and told the two women to get out of the car and stand by the side of the road (R. p.61). Then, Harrod heard Sprouse direct Johnson turn the car around (R. pp. 62-3; 79; 115.) There was no conversation between Johnson and Sprouse before the shooting. Harrod stated that nothing was said that showed Sprouse, prior to the shooting, threatened the two women, cursed, or showed any emotion or anger (Sprouse T. p. 210, 222-4). The shooting violence that actually occurred was sudden.

Third, there was no encouragement by Johnson at any time for Sprouse to use the gun; in fact, Johnson had no way of anticipating that Sprouse would actually fire the gun. In the split seconds between Johnson's turning the car around at Sprouse's directions, his getting out of the car (by her version) with Sprouse ten feet away from the women and the rapid succession of shots that immediately followed, there was virtually nothing Johnson could have done to prevent the shooting.

In sum, the surviving victim's account shows no collusion, collaboration, or plan, and no conversation indicating in any way that Johnson had an intent to murder the victims or that he could anticipate Sprouse's sue of deadly force. The opinion below imputes Sprouse's actions to Johnson without any specific finding of intent to murder or to facilitate a murder.

The end result is to ignore the individual consideration required by Coker, Enmund, and Lockett: "Rape may be highly

reprehensible, but it is less than the extreme offense of murder." Coker, 433 U.S. 584, at 592 ( (1977). In Eberhart, the death sentence could not be given for simple kidnapping and an egregious rape (which involved serious injuries to the victim; see facts at Eberhart v. State, 232 Ga. 247 (1974)). Eberhart v. Georgia, 433 U.S. 917 (1977).

By definition, the crime of rape does not include death or serious injury to the person, and as Coker states:

> "it is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist himself does not take the life of the victim." Coker, 97 S.Ct. at 2870 [emphasis added]

In contrast, the Georgia Supreme Court concludes that Johnsons' "active participation" in the kidnapping and rape defeats the argument that his sentence is excessive and disproportionate. Johnson v. Zant, 249 Ga. 812, 817 (1982).

Moreover, the Georgia Supreme Court finds Johnson's assistance in making a fast getaway after the murder (turning the car around) shows complicity and active participation in the murder. Id. 249 Ga. at 817. This does not make Enmund's holding inapplicable. Enmund drove the getaway car; he actively participated in concealing the murder weapons (which were never recovered) and in harboring his wounded codefendants. Enmund v. State, 399 So.2d at 1362. There was evidence that (a) Enmund had participated in a robbery and (b) helped dispose of the murder weapons after the robbery and shooting, and helped harbor the codefendants at his house. But neither Johnson's nor Enmund's after-the-fact aiding and abetting were the proper focus of their culpability for the murder itself. The main point is that Johnson's participation in a rape and his after-the-fact aiding and abetting is not enough to sustain a death sentence under Enmund's holding.

B. Death sentence cannot solely be premised on "aiding and abetting."

Enmund is not limited to the "felony murder" situation. Earl Enmund could not have been sentenced solely under the Florida felony murder statute (which applies only to triggermen) but was

found liable for first degree murder and for the death penalty also through Florida's accessorial liability rules. Id. 102 S.Ct. at 3371, Enmund v. State, 399 So.2d at 1370. In affirming Enmund's conviction and sentence of death, the Florida Supreme Court explained that "in Florida, as in a majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon." Id. 102 S.Ct. at 3382.

The focus of the inquiry to be made in accordance with Enmund, that is, whether the death sentence is authorized for one who did not "intend to kill or actually kill", is applicable to those instances where a state statute makes the nontriggerman "generally responsible",e.g., equally responsible, with no specific findings as to intent. Id. at 3384.

Under Georgia law, anyone who aids and abets or procures in the commission of a crime is guilty of the crime, whether or not he is present when the crime is committed. Ga. Code Ann. §26-801 (Acts 1968, pp. 1249, 1279) (emphasis added). Georgia has abolished the terminology but not the common law scope of liability regarding "principals" and "accessories" in favor of "party to a crime" which includes principals in the first degree, principals in the second degree, and accessories before the fact. Thus, anyone who is "concerned with the commission of a crime" is liable and may be punished for that crime, regardless of their presence or absence from the scene. (Committee Notes to Ga. Code Ann. §26-801, pp. 108-9, citing Perkins, Criminal Law, 570, 575 (1957)). A Georgia court has noted that "while such a result is difficult to defend as a moral principle, its legal pedigree is well established." Hannah v. State, 125 Ga. App. 596, at 598, 188 S.E.2d 401 (1972).

Section B of Ga. Code Ann. §26-801 sets out the categories of parties including (1) one who directly commits the crime (former principal in the first degree); (3) one who intentionally aids and abets in the commission of a crime (principal in the second

and abets in the commission of a crime (principal in the second degree who does not need to be actually or constructively present during the commission of the crime; (4) one who intentionally advises, encourages, hires, counsels or procures another to commit a crime (accessory before the fact who does not need to be absent during the commission of the crime. (See Committee Notes, supra.)

Under Florida's scheme, the evidence had to at least authorize a finding that Earl Enmund was constructively present aiding and abetting. His jury was charged with first and second degree liability: "first degree liability requires that while in the perpetration of the crime of robbery, the (1) defendant is actually present and (2) actively aiding and abetting the robbery; second degree liability requires that while the defendant is not physically present at the time of the crime, he did procure, counsel, command or aid." Florida Statutes § 782.04 (3)(1973) [emphasis added]. Id., 102 S.Ct. 3380, 3382 f. 16.

Enmund was liable as a principal "constructively adiding and abetting and thus guilty of first degree murder." Id., 102 S.Ct. 3372, citing Enmund v.State, 399 So.2d at 1370. Under these statutes, however, whether or not a defendant is present, the non-homicide defendant may be found equally guilty with the actual perpetrator of first degree murder. Id. 102 at 3372.

## III. THE SENTENCER WAS PRECLUDED FROM PROPERLY FOCUSING ON AND CONSIDERING JOHNSON'S OWN CONDUCT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

### A. The jury in both Enmund and Johnson were instructed on several theories of liability but no findings were required or made.

The jury in Johnson's case was instructed on several theories of liability, including aiding and abetting in an intentional homicide, malice murder, and felony murder (See Appendix B). The jury evidently was confused by the guilt phase charge, as they asked several times for clarifications on portions of the testimony concerning Johnnie's culpability and degree of participation (R., 242; 256-7; 258-9).

The jury was charged with standard "aider and abettor"

language three separate times by their own request (R., 247; 261-2, 263), and as part of that instruction, the jury was told that if Johnson was to be found responsible for the murder, he must participate through "felonious design," e.g. by the kidnapping and rape scheme. The jury was also charged on express and implied malice murder which included an explanation that an abandoned and malignant hear is "commonly evidenced by a lethal weapon and brutal use of the same" (R., p. 243). The jury under the latter theory would need to impute malice from Sprouse's lethal use of the weapon.

Of course, it is not clear which theory the jury applied since no findings as to whether Johnson himself "killed, intended to kill, or attempted to kill" are in the record. What Lockett requires is that the "focus be on his [the defendant's culpability], and not on the person who committed the robbery and shot the victims, for we insist on 'individualized considerations as a constitutional requirement in imposing the death sentence." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Enmund's insistence on "a finding that the defendant had any intention of participating in or facilitating a murder" or that he "killed or attempted to kill," is based on the constitutional necessity of determining the individual culpability and conduct of a nonhomicidal felon. Enmund v. Florida, 102 S.Ct. at 3377, 3381.

Insofar as Johnson's instructions were concerned, the jury, in order to convict Johnson, needed to find nothing more than that Sprouse shot the victim and that Johnson "aid(ed) or abet(ted)" Sprouse in that crime , e.g., by disposing of clothes and the murder weapon.(R., p. 246) Or, the jury might have found that Sprouse shot the victim, but that Johnson was "presen(t during) and participat(ed) in the general transaction in which the homicide (was) committed, and "participated through a felonious design with the person killing," ie. a scheme to rape. In either case, Johnson is guilty, in terms of "his own conduct" or "his

culpability" of no more than either covering up a homicide, or participating in a rape, and is not himself guilty of taking a life or intending that it be taken.

Absent a finding that Johnnie Johnson took life or intended to take life, then Johnson, in terms of "his own conduct" or "his culpability" is at most a rapist (for whom the death sentence is an excessive penalty), and is not a murderer (for which, by itself, the death penalty would be proportionate). Id. at 3371; Coker v. Georgia, 433 U.S. 584.

Johnson's participation in the kidnapping/rape scheme and in after-the-fact aiding and abetting is not enough to sustain a death sentence, contrary to the Georgia Supreme Court's holding in Johnson v. Zant, 249 Ga. at 817. Enmund, of course, had been the one to locate the victims three weeks before the armed robbery; he drove the getaway car; he actively participated in concealing the murder weapons (which were never recovered) and in harboring his wounded codefendants. Enmund v. State, 399 So.2d at 1362. There was evidence that (a) Enmund had participated in a robbery and (b) helped dispose of the murder weapons after the robbery and shooting, and helped harbor the codefendants at his house.

In Georgia law, an accessory after the fact is a separate substantive offense punishable under Ga. Code Ann. §26-2503. The common law elements included (1) a commission of a felony by another; (2) assistance to another in an effort to avoid the consequences of the crime; (3) knowledge of the perpetrator's guilt (Committee Notes on Parties, Subsection B, pp. 107-8, citing Perkins, Criminal Law, p. 578 (1957), and former Code Ann. 26-4601). Also, Code Ann. 26-2503(b) makes it a crime to actually conceal or destroy evidence.

The jury in Johnson's case was not charged on the law of accessory after the fact. Neither Johnson's nor Enmund's after-the-fact aiding and abetting were the proper focus of

culpability for the murder itself. Moreover, both juries were instructed on several theories, including intentional homicide. Johnson's participation in a rape and his after-the-fact aiding and abetting is not enough to sustain a death sentence under Enmund's holding.

In sum, if the jury could or might have convicted the defendant based on findings that are insufficient to support a constitutional death sentence, the sentence must fall, even though it is possible the jury made the requisite finding. What Enmund requires is that the finder of fact be directed to make -- and that it does make -- a clear finding that the defendant either killed or intended to kill. That did not happen in Johnson.

2. The sentencing jury was precluded from considering mitigating factors and particular circumstances of the offense.

The Enmund majority singled out nine state murder statutes as likely to generate disproportionate death sentences under the analysis of Enmund. Id. at 3372, f. 5. Georgia's murder statute, Ga. Code Ann., is one of those. That is, Georgia is one of nine states where a defendant can be executed for an unintended felony murder if sufficient aggravating circumstances are present to outweigh mitigating circumstances. Id. at 3394. However, not even a deliberate murderer can get the death sentence in Georgia unless aggravating circumstances are found. In the instant case, the only findings the jury had to make to support the murder conviction were that of the kidnapping and rape scheme or Johnson's after-the-fact aiding and abetting the murder, neither of which alone is sufficient to support a constitutional death sentence.

But the Johnson jury did not have before them the mitigating evidence to consider Johnson's own conduct and culpability. Since no evidence was presented by Johnson's trial counsel in mitigation, his jury did not have before them the relevant factors such as his youth(21), lack of history of violence, respectable work record, and, most critically, the factors as to lesser culpability and circumstances of the offense. There was not even

a vague reference to the particulars of Johnson's character or particular circumstances as was done in Eddings v. Oklahoma, 102 S.Ct.869 (1982). The most obvious omission was not presenting Johnson's lack of a prior record of convictions, which could well have been considered by the jury in determining Johnson's predisposition to commit a violent crime in this instance.

The only "example" given in the sentencing charge of a possible mitigating circumstance was contained in a statement that counsel were permitted to present additional evidence in "extenuation, aggravation or mitigation," including a prior conviction record, pleas of guilty, or the absence thereof (R. 265). The jury was not clearly instructed on how to weigh aggravating and mitigating circumstances.

As the only "example" of a possible mitigating circumstance, of course the mitigation charge does not fit within the mandate of Lockett v. Ohio, 438 U.S. 586, at 604, 607 (1978), requiring that the sentencer consider "any of the circumstances of the offense" as an "independently mitigating factor." Nor does it meet the requirements set out in Coker v. Georgia, 433 U.S. 584, 589-90 (1977), explaining that aggravating circumstances will not justify a death sentence in a case such as Johnson's, where the penalty is disproportionate to the offense. The issue of concern is whether the jury reasonably may have believed it could not consider any factors other than a prior record or lack thereof (and of course, they did not even have the lack of prior record before them).

The habeas trial court found that the instructions on mitigation could have been more "illuminating," (Appendix B, Order of Habeas Court, SE, March 1982) but concluded that the instructions as a whole met the requirements of Spivey v. Zant, 661 F.2d 446 (11th Cir. 1982). The Georgia Supreme Court, in affirming the judgment found [illegible] jury charges constitutionally

adequate, 249 Ga. 812, 814(2) (1982), but they did not reach the question of whether a reasonable juror would have understood that relative culpability was a mitigating factor.

IV. THE EXECUTION OF JOHNSON WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT

The disproportionality and arbitrariness of the imposition of a death sentence in this case becomes most apparent when considered with the facts now before this Court: Johnson is not the triggerman, yet he is held under a sentence of death. There is only one aggravating circumstance supporting the death sentence, that of (b)(7). His codefendant Sprouse received two death sentences, one for murder and one for kidnapping with bodily injury, but his sentences were vacated by the Georgia Supreme Court on grounds that the jury failed to specify in writing the aggravating circumstances. Sprouse v. State, 242 Ga. 831 (1979). Upon resentencing, Sprouse again received the death sentence, which was reversed by the Georgia Supreme Court because of improper exclusion of evidence. Sprouse v. State, Georgia Supreme Court Case No. 38822 (decided October 27, 1982). The disparity in reviewing and affirming a sentence of death for the less culpable defendant while the triggerman has no valid death sentence is obvious. As the Georgia Supreme Court itself has pointed out, the evidence presented by the state in each of the cases was nearly identical. Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173 (1979).

In Godfrey v. Georgia, 446 U.S. 420, 428 (1980), this Court held that "if a State wishes to authorize capital punishment it has the constitutional responsibility to tailor and apply its laws in a manner that avoids the arbitrary and capricious imposition of the death penalty"[emphasis added]. However, this case amply illustrates that the death penalty is in fact administered and applied arbitrarily and capriciously in the State of Georgia.

The Supreme Court of the United States upheld the Georgia

capital punishment statutes on their face only with the assumption that the procedures mandated by the statutes would assure that sentences of death are not wantonly or freakishly imposed. Gregg v. Georgia, 428 U.S. 153 (1976). Such a result would clearly occur here if Johnson were to be executed even though there has been no finding by the sentencer of his intention to participate in or facilitate a murder or that he killed or attempted to kill as required by Enmund v. Florida, 102 S.Ct. at 3377, 3381.

The Georgia Supreme Court has failed to follow its own precedent in affirming Johnson's death sentence. In Hill v. State, 237 Ga. 794, the evidence was uncertain as to who was the triggerman, and the evidence tended to show that the triggerman was not Hill. Nevertheless, appellant was sentenced to death and the sentence was affirmed. Affirmance of the sentence was based on the theory that Hill was the prime mover. The sentence of death was commuted to life by the Georgia Board of Pardons and Paroles. In Hall v. State, 244 S.E.2d 833 (1978), the Georgia Supreme Court reversed a death sentence for an accomplice because of its disproportionality to a life sentence received by the triggerman pursuant to a plea bargain. The evidence was clear that the codefendant had inflicted the fatal wound. Likewise, in Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977), the Georgia Supreme Court found the death penalty disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, Ga. Code Ann. §27-2537 (c)(3), particularly in that instance where the identical facts were involved and one of the codefendants received a life sentence.

The sentence is also disproportionate because of the mandates of Coker v. Georgia, 433 U.S. 584 (1977). What Enmund does stand for is that a non-homicidal felon, for exmple a robber or rapist, may not constitutionally be sentenced to die unless his own conduct reveals some action or mental state beyond that of any robber or rapist. As to the non-homicidal felon, the fact that

identical risks fortuitously result in death in one case, but not in another, is not sufficient to impose the death sentence in one kind of felony and not another. There was no greater danger of death resulting from what Coker did (including motor vehicle theft, kidnapping, and escape), than what Johnson did (kidnapping and escape) -- but death to one of the victims occurred in Johnson's case. Executing Johnson in the absence of a jury's finding of some action or intention on the defendant's part directed at taking life would be most arbitrary and excessive. There is simply "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it is not," Godfrey v. Georgia, 446 U.S. at 433, but most notably in the case of Sprouse v. State, supra, for Sprouse has no valid sentence of death.

## V. CONCLUSION

This Court should grant Johnson's petition for writ of certiorari to review the judgment of the Supreme Court of Georgia; insofar as it leaves the sentence of death undisturbed, it should be reversed.

Respectfully submitted,

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No. .....
IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHNNIE L. JOHNSON,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served all parties to be served by depositing in the U.S. Mail with first class postage prepaid a copy of the Petition for Writ of Certiorari addressed to:

Susan V. Boleyn, Assistant Attorney General
132 State Judicial Building, 40 Capitol Square, S.W.,
Atlanta, Georgia 30334

An entry of appearance is attached hereto as Exhibit "A."

This 10th day of December, 1982.

Alice C. Stewart

ALICE C. STEWART